

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION ONE**

**ENTERTAINMENT LIVE EVENTS, LLC D/B/A  
NORTH SHORE MUSIC THEATRE**

**Employer**

**and**

**INTERNATIONAL ALLIANCE OF THEATRICAL  
STAGE EMPLOYEES, LOCAL 11**

**Petitioner**

**Case 01-RC-259999**

**DECISION AND DIRECTION OF ELECTION<sup>1</sup>**

Entertainment Live Events, LLC d/b/a North Shore Music Theatre (the Employer) is engaged in the business of operating a performing arts and music theater. International Alliance of Theatrical Stage Employees, Local 11 (the Petitioner) seeks to represent a bargaining unit of all full time and regular part time production stagehands, including run crew, but excluding all other employees, office clerical employees, guards and supervisors, as defined in the Act.

The Employer raised no issue regarding the appropriateness of the unit in its Statement of Position. Rather, the Employer takes the position that the proposed unit has been laid off in its entirety due to the COVID-19 pandemic and that, therefore, any election at this time is inappropriate.

Two related matters remain in contention: whether to conduct a manual or mail ballot election and the appropriate eligibility formula, including for employees who have been laid off.

**The Employer's Operating Status**

In March 2020, Employer ceased operations in compliance with state and local orders related to public safety during the COVID-19 pandemic. As a result, the Employer laid off all of the petitioned-for employees. In April 2020, the Employer announced the postponement (rather than cancelation) of its scheduled 2020 productions. The Employer's continued correspondence to employees indicates plainly that the employees should expect to be recalled when it is legal

---

<sup>1</sup> The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer. Parties were given the opportunity to file post-hearing briefs, and both parties did so.

and safe for the theater to re-open. The record indicates that the Employer has applied for a Paycheck Protection Program loan, the terms of which require the Employer to certify that the funds will be used to retain employees.

The Employer has argued that the current circumstances have prevented it from obtaining information necessary to prepare for a pre-election hearing or an election. While the Employer has not provided a comprehensive list of unavailable information, it has expressed a concern that it cannot compile a list of petitioned-for employees to determine whether the unit is appropriate. A list of employees, however, is not necessary for a party to take a position on whether a grouping of employees forms an appropriate unit. More importantly, other than assert that a unit does not exist because it is temporarily closed and all employees are laid-off, the Employer did not assert that the unit sought by the Petitioner is inappropriate or identify an alternative unit in its Statement of Position or at the hearing.<sup>2</sup>

However, the record reveals that the Employer has the means to communicate with employees about their layoff and potential recall; with the federal government regarding the Paycheck Protection Program; and with its patrons regarding new production dates for its postponed 2020 season. Even operating under the unlikely assumption that two decades into the twenty-first century vital information cannot be accessed by the Employer through laptop computers or an intranet system, no state or local order bars a representative of the Employer from entering the Employer's own premises. The Employer has been prohibited from staging productions and gathering hundreds of artists and patrons, but has not been prohibited from sending a designated individual into an otherwise empty building to collect the names and addresses of its own employees, who must be kept apprised of the Employer's plans to reopen.

Therefore, I reject the Employer's request that I postpone the processing of this petition until theater operations have resumed.

#### Method of Election

Neither party argues that a manual election is appropriate at this time. Due to the COVID-19 pandemic, such a gathering would be unsafe and in violation of restrictions issued by state and local governments.

In *San Diego Gas and Electric*, 325 NLRB 1143 (1998), the Board reviewed the circumstances under which it may be appropriate to direct a mail ballot election. Under the guidelines set forth in *San Diego Gas*, a mail ballot election may be appropriate where eligible voters are "scattered" because of their job duties in terms of geography and/or varied work schedules, so that all employees cannot be present at a common location at common times to vote manually. When these situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of the parties and the efficient use of Board resources.

---

<sup>2</sup> As a result of its failure to take a stance on the appropriateness of the unit in its Statement of Position, the Employer would have been precluded from urging an alternative unit at the hearing in any event.

The employees at issue here may or may not be “scattered” in the traditional sense. They are, however, undisputedly “scattered” by COVID-19, and it is clearly within my authority to direct an immediate mail ballot election as requested by the Petitioner.<sup>3</sup> This is especially true in this instance where all employees are on indefinite lay-off and will not be reporting to the facility for the foreseeable future.

The Employer argues that only a manual election is appropriate, and that such an election should be held at an indefinite point in the future when the theater has re-opened. I find that a potentially lengthy delay is not appropriate where a valid alternative is at hand. The Board has long taken the position that questions concerning representation must be resolved as quickly as possible. The current rule governing representation cases, which became effective in 2015, makes note of the importance of a swift resolution:

Underlying these basic provisions is the essential principle that representation cases should be resolved quickly and fairly. “[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331. Within the framework of the current rules—as discussed at length in the NPRM—the Board, the General Counsel and the agency’s regional directors have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. In part, the final rule codifies best practices developed over the years. This ensures greater uniformity and transparency... The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified. The statute was designed by Congress to encourage expeditious elections, and the rules require the regional director to schedule the election in a manner consistent with the statute.

The new rule expected to take effect later this year also emphasizes the holding in *A.J. Tower* that employees’ votes ought to be recorded speedily:

Within this general framework, “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331...

As noted above, the Supreme Court has identified speed in recording employees’ votes as one interest the Board’s representation procedures are bound to serve. This interest in speed or promptness has long been reflected by both the Board’s and Congress’s emphasis on the need for expedition in representation cases.

The Employer asserts that a mail ballot election will result in low voter turnout; that the Employer and Petitioner would not be able to meet in person to bargain for a first contract should

---

<sup>3</sup> See *Atlas Pacific Engineering Company*, 27-RC-258742 (May 8, 2020). The Board, in denying the employer’s request for review, stated that the COVID-19 pandemic constitutes extraordinary circumstances warranting a mail ballot where federal, state, and local government directives have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on what was mandatory telework.

a majority of employees choose to be represented by the Petitioner; that the Employer and Petitioner will not be able to communicate with the employees about their options prior to an immediate election; that a mail ballot election may be unsafe; and that the counting of ballots may be unsafe. These arguments are not persuasive. The Employer presents no evidence in support of its conjecture that voter turnout will be low or that procedures will be unsafe. Recently directed mail ballot elections have allowed sufficient time for employees to “quarantine” their mail if they so choose and the same will be true here. Likewise, the logistics of a mail ballot count will be in keeping with all state and local orders to protect the safety of all involved. The parties are free to bargain remotely if face to face meetings cannot be held and hypothetical obstacles at a hypothetical bargaining table do not justify postponing an election. Finally, many methods of digital communication are available in equal measure to the employees, the Petitioner, and the Employer. Indeed, the Employer has already demonstrated its ability to communicate with employees remotely by emailing them the news of their layoff and potential recall.

#### Eligibility Formula

The Employer proposes that no employee should be eligible to vote while the theater is closed, and that only employees who have worked for two seasons and expressed an intention to return to work the following season should be permitted to vote when the theater reopens. The Employer cites no case law in support of its proposed departure from the Board’s established procedures.

It is well established that temporarily laid-off employees are eligible to vote. However, in order to be considered a temporarily laid-off employee, the employee must have a reasonable expectation of recall, *Apex Paper Box Co.*, 302 NLRB 67 (1991). In order to determine whether laid-off employees have a reasonable expectation of recall, the Board looks at objective factors such as the employer’s past layoff practices, the employer’s future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall. *Id.* at 68. The laid off employee must have a reasonable expectation of recall as of the payroll eligibility date. *Id.*; see also *Tomadur, Inc.*, 196 NLRB 706 (1972), *Pavilion at Crossing Point*, 344 NLRB 582 (2005). The “burden of proof is on the party who seeks to disfranchise the employee,” which in this case is the Employer, *Pavilion at Crossing Pointe*, citing *Laneco Construction Systems*, 339 NLRB 1048 (2003).

Here, all evidence establishes that the laid-off employees have a reasonable expectation of recall. The Employer did not lay off the employees due to lack of work or a change in business model. Rather, the Employer laid them off due to an unprecedented global pandemic and has notified both the employees and the public that it intends to resume business as soon as practicable. Additionally, the Employer has applied for a loan which is intended for businesses planning to recall their employees.

Regarding the appropriate eligibility formula for at least any part of the bargaining unit that does not enjoy steady employment regardless of their layoff status, the Board has fashioned special formulas tailored to the needs of industries that “do not have the kind of steady

employment that is characteristic of the mainstream of industrial enterprise,” NLRB Outline of Law and Procedure in Representations Cases. § 23-400 (2013). The entertainment industry is one such industry. *Id.* § 23-460.

In the entertainment industry, the Board devises an “eligibility formula to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer,” *Trump Taj Mahal*, 306 NLRB 294, 296 (1992). Although various formulas have been devised, a common special formula used in the entertainment industry, and the one most appropriate here, is the *Julliard* formula, which measures the eligible voters as those employees that worked on two productions for a total of 5 working days over a 1-year period or 15 days over a 2-year period. Outline of Representation Law § 23-460; see *Julliard School*, 208 NLRB 153 (1973); *Kansas City Repertory Theatre*, 356 NLRB 147 (2010); *Wang Theatre*, Case No. 01-RC-166997 (Jan. 28, 2016), *request for review denied* (Jun. 3, 2016).

A music theater which may stage several productions in quick succession before pausing in between “seasons” is the precise scenario for which the *Julliard* formula was created, and is appropriate to utilize it here.<sup>4</sup>

The Employer’s suggestion that employees should have to express a willingness to continue to work for a year after the election in order to be permitted to vote is both impractical and contrary to established Board law. The fact that an employee intends to quit after an election, and does in fact quit, does not affect his eligibility to vote. For example, in *Personal Products Corp.*, 114 NLRB 959, 961 (1955) the Board overruled a challenge to a ballot where the employee gave notice to the employer that she would terminate her employment two days after the election. See also *Saint-Gobain Industrial Ceramics v. NLRB*, 310 F.3d 778 (D.C. Cir. 2003), where an employee’s plan to leave his job after election and use of vacation time to allow him to start a new job and still vote in the election did not affect his eligibility.

### Conclusion

Based on the discussion above, I find, that the following bargaining unit is appropriate under the Act:

All full-time and regular part-time production stagehands, including run crew; but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 11.

---

<sup>4</sup> Although the *Julliard* formula captures everyone who would be eligible to vote in this election, the core production and stagehand employees who work year around or work regularly nine to ten months a year would be eligible under the traditional reasonable expectation of recall standard that is used for most industries.

### **A. Election Details**

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On June 16, 2020, ballots will be mailed to voters by National Labor Relations Board, Subregion 34. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Subregion in the mail.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 34 office by close of business on July 14, 2020.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 23, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 1 Office at (617) 565-6700 or should contact the Subregion 34 office (Hartford, CT) at (860) 240-3522.

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Zoom, Skype, WebEx, etc.) to be determined by the Acting Regional Director, at 10:00 am on July 17, 2020. Each party will be allowed to have one observer attend the virtual ballot count.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were on the payroll as of **Wednesday, May 27, 2020**, including employees who did not work because they were ill, on vacation, or temporarily laid off and have worked on at least two productions for a total of 5 working days over a 1-year period or 15 days over a 2-year period.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Acting Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Monday, June 1, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

### D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies and distribute the Notice by 12:01 a.m. June 11, 2020** and copies must remain posted until the end of the election. However, a party shall be

estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Acting Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Acting Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: May 28, 2020



---

Paul J. Murphy, Acting Regional Director  
National Labor Relations Board  
Region 01

Attachment